

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES STANFORD)	
Claimant)	
VS.)	
)	
MCGREEVY'S MID WEST MEAT COMPANY)	Docket No. 1,018,991
Respondent)	
AND)	
)	
KANSAS RESTAURANT AND HOSPITALITY ASSOCIATION SELF-INSURANCE FUND)	
Insurance Fund)	

ORDER

Respondent and its insurance fund appealed the July 28, 2006, Award entered by Special Administrative Law Judge Vincent L. Bogart. The Workers Compensation Board heard oral argument on October 20, 2006, in Wichita, Kansas.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board the parties agreed the Award should be corrected to reflect that claimant was entitled to receive a total of 57.37 weeks of temporary total disability benefits.

ISSUES

Claimant was injured while working for respondent on July 9, 2004. In the July 28, 2006, Award, Judge Bogart determined claimant sustained a 25 percent whole person functional impairment. In addition, the Judge awarded an 80 percent permanent partial general disability under K.S.A. 44-510e based upon a 100 percent wage loss and a 60 percent task loss.

Respondent and its insurance fund contend the Judge erred. They argue claimant has failed to make a good faith effort to find work and that he retains the ability to earn a comparable wage. Accordingly, they request the Board to limit claimant's permanent disability to the 25 percent whole person functional impairment rating found by Dr. Robert L. Eyster. Alternatively, respondent and its insurance fund argue claimant's task loss does not exceed 21 percent. In summary, respondent and its insurance fund request the Board either to reduce claimant's permanent disability to 25 percent or to impute a post-injury wage and average the resulting wage loss percentage with a 21 percent task loss.

Claimant also contends the Judge erred. Claimant argues he is realistically unemployable and, therefore, he should receive an award of permanent total disability benefits. In the alternative, claimant requests the Board to affirm the finding of an 80 percent work disability. In addition, claimant argues his whole person functional impairment should be increased from 25 to 34 percent as he has injured both his left hip and low back.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

Claimant is a 47-year-old manual laborer. Respondent, which is a meat processor, employed claimant as a laborer.

On July 9, 2004, claimant was struck on the left side of his low back by the handle of a pallet jack. Claimant initially experienced a large bruise and pain in the area where he was struck. Within days of the incident, claimant began experiencing pain down into his left leg. At that point, claimant sought medical treatment.

Despite ongoing symptoms, and missing some days from work, claimant continued working for respondent until approximately late August 2004. By that time, claimant had begun treating with orthopedic surgeon Dr. Robert L. Eyster, who diagnosed avascular necrosis in claimant's left hip and had recommended surgery. In early 2005, Dr. Eyster replaced claimant's left hip.

Claimant testified at his February 2006 regular hearing that he had not worked anywhere since August 2004 when he last worked for respondent. Moreover, following claimant's release from Dr. Eyster's care on August 22, 2005, respondent had declined to accommodate claimant's limitations. Consequently, claimant remains unemployed and he

has applied for and received unemployment benefits. In addition, he has also applied for Social Security disability benefits as he does not believe he can work.

It is unclear from claimant's testimony regarding his search for other employment whether he has been submitting three or four job applications per week since being released to work or whether that is the total number of job applications he submitted in January and February 2006. The record does not contain a written list of the job contacts claimant has made looking for work nor any other document that would tend to substantiate a good faith job search.

In addition to the permanent impairment claimant has from his left hip replacement, claimant's ability to find work is also hampered by some significant gaps in his employment history, his long-term lack of a valid driver's license and his limited formal education. According to claimant, he has not had a driver's license for approximately 20 years and he neither completed the eleventh grade nor obtained a GED.

In November 2005, vocational rehabilitation consultant Steve L. Benjamin wrote claimant's attorney advising that he had been retained to provide wage and task loss opinions and to provide claimant with job placement services. Mr. Benjamin interviewed claimant and formulated wage and task loss opinions. But the record is not clear what happened to the proposed job placement plan after claimant's attorney wrote opposing counsel and requested additional information about the proposed placement services.

The record contains two expert medical opinions regarding claimant's impairment rating, his permanent work restrictions and the tasks he should no longer perform due to his July 2004 accident at work.

Dr. Eyster, who last saw claimant in December 2005 regarding the injuries in this claim, concluded claimant sustained a 25 percent whole person functional impairment for the left hip injury as measured by the *AMA Guides*¹ (4th ed.). Dr. Eyster also concluded claimant could work but he should no longer perform deep squats, repetitively climb stairs, lift over 50 pounds or repetitively lift over 25 pounds.²

Dr. Eyster also reviewed a list of work tasks that claimant performed in the 15-year period before the July 2004 injury, which was prepared by claimant's vocational expert

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

² Dr. Eyster's notes indicate on August 22, 2005, he also restricted claimant from prolonged standing and walking. But at his deposition the parties did not ask the doctor about those restrictions or the apparent inconsistency between his notes and testimony.

Jon E. Rosell. Excluding those tasks that Mr. Rosell designated were duplicates, Dr. Eyster concluded claimant could not, or should not, perform 9 of 38 former tasks, or 24 percent.

At his attorney's request, claimant saw Dr. Michael H. Munhall, who is board-certified in physical medicine and rehabilitation, in October 2005 to be evaluated for purposes of this claim. Dr. Munhall testified claimant had permanent impairment to both the left hip and low back that was attributable to claimant's accident at work.

Using the *AMA Guides* (4th ed.), the doctor rated claimant as having a 30 percent whole person functional impairment due to his left hip replacement and a five percent whole person functional impairment due to his low back. Those ratings combine to create a 34 percent whole person functional impairment. Dr. Munhall did not address what restrictions claimant should observe. Instead, the doctor concluded claimant could not perform any of the former work tasks listed by Mr. Rosell and, more importantly, that claimant was unable to engage in any substantial and gainful employment.

Neither Dr. Eyster nor Dr. Munhall quantified the amount of any pre-existing impairment claimant had in either his hip or low back before the July 2004 accident at work. In fact, Dr. Eyster did not testify about claimant's low back at all.

The Board is not persuaded that claimant is unable to work due to his July 2004 accident and the resulting left hip injury. In this instance, the Board is persuaded by Dr. Eyster's testimony that claimant retains the ability to work. Accordingly, the Board finds claimant should observe the permanent work restrictions recommended by Dr. Eyster, which, as a practical matter, would limit claimant to lighter work.

This is a difficult claim as claimant, who had a limited labor market before the accident, has sustained a significant injury that has further eroded his ability to work. Due to his permanent work restrictions, limited education and lack of transferable job skills, claimant may have a difficult time finding employment. At this juncture, however, the Board believes claimant could work within Dr. Eyster's work restrictions but he has not made an adequate or genuine effort to find an appropriate job.

Respondent and its insurance fund's vocational expert, Steve L. Benjamin, identified several unskilled entry-level jobs that claimant retains the ability to perform: counter or rental clerk, bench hand cutter or trimmer, hand packager, bench grinder or polisher, parking lot attendant, and sewing machine operator. And claimant's vocational expert, Mr. Rosell, likewise indicated claimant retained the ability to work as a surveillance monitor considering Dr. Eyster's restrictions.

The Board finds claimant injured his left hip working for respondent. Accordingly, claimant is entitled to receive permanent disability benefits as defined by K.S.A. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*³ and *Copeland*.⁴ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁵

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁵ *Id.* at 320.

The Kansas Court of Appeals in *Watson*⁶ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁷

Claimant has not proven he has made a good faith effort to find appropriate work. Indeed, seeking work would be inconsistent with claimant's belief that he is now unable to work and his applying for Social Security disability benefits. For purposes of the permanent partial general disability formula, the Board must impute a post-injury wage. Considering Dr. Eyster's restrictions, Mr. Rosell testified claimant should be able to earn between \$6.50 and \$7.25 per hour. And Mr. Benjamin concluded claimant retains the ability to earn from \$270 to \$453.60 per week. The Board concludes claimant retains the ability to earn approximately \$7 per hour, or approximately \$280 per week.

The parties stipulated claimant was earning \$200.55 per week on the date of his accident. Comparing claimant's pre-injury wage with his imputed post-injury wage, claimant has failed to prove that he has sustained any wage loss due to his occupational injury. Accordingly, claimant's permanent disability benefits should be limited to his functional impairment rating. Averaging the ratings Dr. Eyster and Dr. Munhall provided for claimant's left hip yields approximately 28 percent. Consequently, claimant's permanent disability should be decreased from 80 percent to 28 percent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and not necessarily any individual member's analysis of the law or facts. And the signatures below confirm this decision is that of the majority.

⁶ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁷ *Id.* at Syl. ¶ 4.

⁸ K.S.A. 2005 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the July 28, 2006, Award entered by Judge Bogart.

James Stanford is granted compensation from McGreevy's Mid West Meat Company and its insurance fund for a July 9, 2004, accident and resulting disability. Based upon an average weekly wage of \$200.55, Mr. Stanford is entitled to receive 57.37 weeks of temporary total disability benefits at \$133.71 per week, or \$7,670.94, plus 104.34 weeks of permanent partial general disability benefits at \$133.71 per week, or \$13,951.30, for a 28 percent permanent partial general disability. The total award is \$21,622.24.

As of November 15, 2006, Mr. Stanford is entitled to receive 57.37 weeks of temporary total disability compensation at \$133.71 per week, or \$7,670.94, plus 65.29 weeks of permanent partial general disability compensation at \$133.71 per week, or \$8,729.93, for a total due and owing of \$16,400.87, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$5,221.37 shall be paid at \$133.71 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Fund
Nelsonna Potts Barnes, Administrative Law Judge
Vincent L. Bogart, Special Administrative Law Judge